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No. 883

In the

Supreme Court of the United States

TERM, 1958

MARY KATHRYN SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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TERM, 1958

MARY KATHRYN SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 30, 1958.

Petition for Rehearing was timely filed and overruled on February 25, 1958, thereafter Motion to Stay the Mandate was granted by the Court.

CITATIONS TO OPINION BELOW

The case is reported in F. 2d (Printed in Appendix A).

JURISDICTION

The jurisdiction of this court is invoked under Title 28, Section 1254 (sub-sec. 1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Where the record reflects:

   (a) That petitioner was indicted as a principal under Title 18, U. S. C., Sec. 2313 (sale of stolen automobiles that had been transported in interstate commerce).

   (b) The trial court permitted conviction of petitioner as an aider and abettor under Title 18, U. S. C., Sec. 2.

Q. Must the proof establish that another person committed the offense (all elements) who was aided and abetted by petitioner? Classification, *Horton v. U. S., C. C. A. 7, Ill. 1950, 180 Fed. 2d 427*, or must the proof only establish that someone else might have committed the substantive offense as principal who was aided and abetted by the petitioner? Classification, *Von Patzoll v. U. S., 10 C. C. A. 1947, 163 Fed. 2d 216-219.*

2. Is it necessary for the trial court to charge on the credibility of a confession where it is a disputed question of fact?

STATUTES INVOLVED

Title 18, U. S. C., Sec. 2313; Title 18, U. S. C., Sec. 2.

STATEMENT OF THE CASE

Appellant was charged by indictment with a violation of the Dyer Act, Title 18, U. S. C., Section 2313. Count I of the indictment charged the sale of a 1956 Buick 4-door sedan, which was moving as a part of interstate commerce and that Appellant knew that it had been stolen. Count II charged the same offense with reference to a 1956 Dodge. The case was tried to a jury on the 21st day of January, 1957, and on January 22nd, 1957, the jury returned a verdict of guilty as to both counts of the indictment. On January 23rd, 1957, the Court imposed a sentence of two years generally. Appellant gave written notice of appeal on January 23rd, 1957, and she is here seeking a grant of the writ of certiorari to review the judgment of the Court of Appeals rendered on the 30th day of January, 1958.

FACTS

The evidence developed that petitioner came to the State of Texas in her own automobile and that petitioner's husband, Harold Smith, and his companion, Paul Brinkley, drove two late '56 model automobiles from Kansas to Dallas, Texas. The evidence further developed that petitioner contacted one Cecil R. Adkins concerning the purchase of the two late '56 model automobiles. The facts further showed according to Cecil R. Adkins that appellant somehow produced the two automobiles and obtained a downpayment from him thereon and that that was the

only connection that petitioner had with the said automobiles.

The evidence for the petitioner developed that she had no knowledge that the two automobiles were stolen and that her only connection with the alleged automobiles was to pick up a downpayment at the request of Harold Smith and Paul Brinkley, from Cecil R. Adkins. The only other evidence implicating petitioner with the offense was a written statement which she refused to sign because appellant testified that the F. B. I. had included in the statement matters that were not true, that is, concerning her guilty knowledge that the cars were stolen.

The only connection of Harold Smith and Paul Brinkley with the charge was petitioner's testimony that they drove the two '56 automobiles down from Kansas and that petitioner contact Cecil R. Adkins concerning the sale and that she pick up the downpayment on the automobiles. The evidence further showed that Harold Smith and Paul Brinkley were convicted of transporting in interstate commerce stolen automobiles from the State of Kansas to Texas. The evidence did not show a sale on the part of Brinkley or Smith to Adkins.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in the Per Curiam Opinion is in conflict with the statutory construction given Title 18, Sec. 2, U. S. C. A., in the Court of

Appeals for the Seventh Circuit and in the Court of Appeals for the Tenth Circuit. See the following authorities:

Horton v. U. S., C. C. A. 7, Ill. 1950, 180 F. 2d 427 (4, 5)—The defendant may be tried and convicted as a principal upon proof, that he aided and abetted the commission of a crime, but one cannot aid and abet in the commission of a crime unless there is another who has committed the offense;

Morgan v. U. S., C. C. A. 10, Okla., 159 F. 2d 85-87 (1947) — under a charge of aiding and abetting one cannot be convicted without satisfactory evidence, not only of participation as an aider and abettor but the proof must show that another committed the offense which was aided and abetted;

Von Patzoll v. U. S., 10th Circuit, 1947, 163 F. 2d 216-219—this decision changes the rule in the Tenth Circuit and holds in effect that the proof need not show that someone else did commit the offense as to all its constituent elements, but only that someone else may have committed the offense.

Smith v. U. S., 5th Circuit, 1958, F. 2d , per curiam.

In petitioner's case, there is no proof that someone else may have committed the offense as an aider and abettor, much less that someone else did commit the offense as to all its constituent elements as required in *Horton* above.

Thus, it is apparent that there is a direct conflict as to the legal construction to be given Title 18, U. S. C. A., Sec. 2. The conflict is not one of fact. It is true that petitioner was not apprised of the reasoning of the Court of Appeals by the Per Curiam Opinion, however, the proper statutory construction to be given Title, 18, U. S. C. A.,

Sec. 2, is one of great importance. The conflict between the Seventh, Tenth and Fifth Court of Appeals should be decided by this Honorable Court.

2. The decision of the Court of Appeals in holding that a charge on the credibility of petitioner's confession was not required where there was an issue as to the credibility, is in conflict in principle with this Honorable Court's decision in *Wilson v. U. S., 162 U. S. 613, 624.*

The decision of the Court of Appeals is in conflict with the following decisions in the Court of Appeals for the District of Columbia:

Catoe v. U. S., 131 F. 2d 15, 19 D. C.;

Tyler v. U. S., 193 F. 2d 24, 28, D. C. Cert. Den. 343 U. S. 908.

Under the authority and procedure as outlined in the *Wilson* case above, these decisions in the Court of Appeals for the District of Columbia hold that not only is the accused entitled to a submission of the question of voluntariness of a confession where same is in dispute to the jury, but that the accused is also entitled to a submission of the credibility of the statement or confession where the credibility thereof is a disputed factual issue. (Petitioner refused to sign the statement because the F. B. I. wrote in the statement that she knew the cars were stolen.)

A proper exception was reserved to the trial court's failure to charge on the credibility of petitioner's confession. The affirmance of this cause by the Court of Appeals

places the decision of the Court of Appeals in conflict with the decision of the Supreme Court in the *Wilson* case above and in conflict with the Court of Appeals for the District of Columbia Circuit.

IMPORTANCE

The questions presented in this petition for writ of certiorari are of sufficient importance to authorize this Honorable Court to grant the writ for the following reasons:

1. The proper construction to be given Title 18, U. S. C. A., Sec. 2, is of primary concern to every Federal District Court in the United States.

2. The proper construction to be given the law of principals and the law of aiders and abettors is not only a question of substantive law but also one of procedure.

3. A uniform application of the statute should be available in every Court of Appeals.

As to the question of the proper charge to be given concerning a confession and its credibility, there can be no doubt that Federal jurisdictional and procedural issues are involved which would warrant the grant of the Writ of Certiorari. Classification, *Bruner v. U. S., 343 U. S. 112; McNabb v. U. S., 318 U. S. 332, 341; Sacher v. U. S., 343 U. S. 1.*

This Honorable Court has granted petitions for Writs of Certiorari in cases involving the proper construction of federal rules of Civil and Criminal procedure. Classifica-

tion, *Hickman v. Taylor, 329 U. S. 495; Upshaw v. U. S., 335 U. S. 410.*

There can be no doubt that an important issue concerning the proper application of the law of principals is here presented.

The Supreme Court in the exercise of its supervisory authority over the administration of criminal justice in the Federal Courts is not restricted to the requirements of the Constitution with reference to rules of evidence and to procedure. Classification, *Nardone v. U. S., 308 U. S. 338.*

Petitioner respectfully submits that not only is there a conflict in the Courts of Appeal on the matters presented in this petition, but that the decision of the Court of Appeals was erroneous below to such an extent that Certiorari jurisdiction should be exercised by this Honorable Court, even if the conflict were factual and not legal. See:

Chambers v. Florida, 309 U. S. 227;

Malinski v. New York, 324 U. S. 401;

Hawk v. Olson, 326 U. S. 271;

DeMeerleer v. Michigan, 329 U. S. 663.

The above decisions would indicate that the compelling reason for the grant of Certiorari in those cases was the erroneousness of the decision below in cases involving coerced confessions and the appointment of counsel in criminal cases.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

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CHARLES W. TESSMER,
1002 Fidelity Building,
Dallas, Texas,
Counsel for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that on the.....day of....., 1958, I mailed two copies of this Petition, postage prepaid, to the Solicitor General of the United States, at his office in Washington, D. C., and a copy, postage prepaid, to the United States Attorney at Dallas, Texas, by leaving a copy at his office.

.....

CHARLES W. TESSMER

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16475

MARY KATHRYN SMITH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(January 30, 1958.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

PER CURIAM: The appellant appeals from a conviction under the Dyer Act, 18 U. S. C. A. Sec. 1213, of selling in Dallas, Texas, two automobiles which had been stolen in Wichita, Kansas, and which she knew had been stolen. The questions raised are not, in our opinion, substantial, and the errors, if any there were, at the trial, were harm-

less. The evidence was more than sufficient to sustain the verdict of guilt. The judgment appealed from is

AFFIRMED.

A true copy
Test: /s/ Edward W. Wadsworth
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

APPENDIX B

JUDGMENT

Extract from the Minutes of January 30, 1958.

No. 16475

MARY KATHRYN SMITH

v.

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

—00000—

APPENDIX C

Title 18 U. S. C., Sec. 2, provides:

"2. Principals

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

Title 18 U. S. C., Sec. 2313, provides:

"2313. Sale or receipt of stolen vehicles

"Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 806."

APPENDIX D

ORDER STAYING MANDATE FILED:—

March 5, 1958.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,475

MARY KATHRYN SMITH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days from February 25, 1958; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from February 25, 1958 there shall be filed with the clerk of this court the certifi-

cate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from February 25, 1958, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 5th day of March, 1958.

/s/ ELBERT P. TUTTLE

United States Circuit Judge.

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